

No. 1132

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IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE M. HOLLEY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

PETITION FOR REVIEW ON WRIT OF CERTIORARI
OF THE DECISION OF THE CIRCUIT COURT OF
APPEALS, SIXTH CIRCUIT
AND SUPPORTING BRIEF

**IN THE
SUPREME COURT OF THE UNITED STATES**

GEORGE M. HOLLEY, *Petitioner,*

VS.

UNITED STATES OF AMERICA, *Appellee.*

**PETITION FOR REVIEW ON WRIT OF CERTIORARI
OF THE DECISION OF THE CIRCUIT COURT OF
APPEALS, SIXTH CIRCUIT
AND SUPPORTING BRIEF**

George M. Holley, by his attorney Paul B. Moody, respectfully shows unto the Court as follows:

SHORT STATEMENT OF MATTER INVOLVED

This case involves income tax levied on certain interest paid by the City of Detroit.

The City of Detroit commenced an eminent domain proceeding to condemn land, including petitioner's land, for the widening of Woodward Avenue (R. 14). The City, being in financial difficulty, entered into contracts with petitioner and a major proportion of the other owners, providing that when a condemnation award should be made and confirmed, the award need not be paid within one year with interest at 5% per annum as provided by law, but might be paid in ten equal annual instalments with interest at $4\frac{1}{4}\%$ per annum (R. 15-18).

The contract specifically provided any balance owing thereon should be tax exempt by the City, and that the contract should be construed to be a contract for the purchase of the land at the price awarded by the condemnation jury (R. 17). If the contracts had not been made, the City against its own desire, would because of its financial position have discontinued the condemnation proceedings (R. 15).

The proceedings resulted in a taking of the land and an award of damages to petitioner, the same being duly confirmed. Thereafter, pursuant to the contract, the City paid petitioner instalments of principal and interest at $4\frac{1}{4}\%$ during each of the years 1934, 1935 and 1936 (R. 19).

The Commissioner of Internal Revenue assessed and collected from petitioner income taxes for the years 1934 through 1936 on the theory that the interest paid by the City on the contract was taxable interest (R. 10-11). The Commissioner has never made any claim that petitioner realized a capital gain on the sale of his land to the City.

Petitioner claimed the interest is exempt under Section 22 (b) (4) of the Revenue Act of 1934 and 1936, which are identical with the present law, Internal Revenue Code Section 22 (b) (4), providing that interest upon the obligations of a political subdivision of a state shall be exempt from income taxation.

Petitioner's claims for refund being denied he brought the present action for refund in the District Court for the Eastern District of Michigan, Southern Division. The facts were stipulated and adopted by the district judge as his findings of fact. The matter came up on appeal to the Circuit Court of Appeals for the Sixth Circuit.

On January 10, 1942, the Circuit Court filed its opinion holding the interest was part of the condemnation award

and as such taxable interest and entered judgment affirming dismissal of the case (124 Fed. (2nd) 909). Petition for rehearing was filed January 28, 1942, and denied without opinion on February 12, 1942.

BASIS OF JURISDICTION

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals rendered on January 10, 1942, on writ of certiorari by virtue of Section 240 (a) of the Judicial Code of 1911, Chapter 231; 36 Stat. 1157, as amended by Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938.

THE QUESTIONS PRESENTED

The following questions are presented by the case.

1. Is interest paid by a political subdivision of a state on instalment contracts for the purchase of land exempt from income tax under Section 22 (b) (4) of the Revenue Acts of 1934 and 1936, as interest paid on the obligation of a political subdivision of a state?

The Circuit Court of Appeals decided this question by ignoring the contract and holding the interest was paid as part of a condemnation award.

2. Is interest paid on a condemnation award exempt from income tax under Section 22 (b) (4) of the Revenue Acts of 1934 and 1936?

The Circuit Court of Appeals held the interest was taxable.

3. If not exempt, is interest paid on a condemnation award taxable as interest or only as capital gain, if there be gain?

The Circuit Court of Appeals held the interest was taxable as interest.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals, Sixth Circuit, in this case is in conflict with the decisions of other Circuit Courts of Appeal on the same subject.

A. In the instant case the Circuit Court held (as we think, erroneously) that interest paid as provided in the contract was part of the just compensation provided by law for the taking of the property and as such part of the award itself.

On this premise, the Court's final decision that the interest was taxable as interest is in conflict with two decisions of the Circuit Court of Appeals, Second Circuit, which held interest on a condemnation award not taxable as interest but only taxable as a capital gain, if such gain occurred. The conflicting decisions are:

Seaside Improvement Co. v. Commissioner, 103 Fed. (2d) 990 (CCA 2d);

Commissioner v. Appleby's Estate, 123 Fed. (2d) 700 (CCA 2d).

B. If the Circuit Court had held correctly that the interest was paid on an instalment contract for the purchase of land by the City, then its final decision holding the interest taxable is in conflict with decisions of three different Circuit Courts of Appeal which hold such interest exempt

Norfolk National Bank v. Commissioner, 66 Fed. (2d) 48 (CCA 4th);

Kings County Development Co. v. Commissioner,
93 Fed. (2d) 33 (CCA 9th);
Commissioner v. Meyer, 104 Fed. (2d) 155
(CCA 2d).

2. The opinion of the Circuit Court of Appeals decides important questions of federal law which have not been but should be settled by the Supreme Court.

WHEREFORE your petitioner respectfully prays the Court to issue its writ of certiorari to review the Decision of the Circuit Court of Appeals, Sixth Circuit, in the case of George M. Holley, Appellant, vs. United States of America, Appellee, No. 8759.

PAUL B. MOODY
Attorney for Petitioner
1424 Ford Building
Detroit, Michigan.

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss.

On this 3rd day of April, 1942, before me, a notary public in and for said County, personally appeared Paul B. Moody to me known to be the person named in and who signed the foregoing petition, and made oath that he has read the same, knows the contents thereof, and that the same is true in substance and in fact.

CAROLYN BELLAMY
Notary Public, Oakland County, Mich.
Acting in Wayne County, Michigan.
My Commission expires July 14, 1942.

SUPPORTING BRIEF

I. Interest paid by the City of Detroit on its instalment contract to purchase petitioner's land was exempt under Section 22 (b) (4) of the Revenue Acts.

A. The interest was paid on an instalment contract for the purchase of land.

The parties to the contract expressly provided therein that the contract was to be construed as a contract for the purchase of land at the price awarded by the condemnation jury (R. 17, No. 6).

The contract provided the award should be paid in ten equal annual instalments with interest at $4\frac{1}{4}\%$ instead of within one year from date of confirmation (R. 16) with interest at 5% per annum as required by law. *Campau v. City of Detroit*, 225 Mich. 519.

The contract provided the City could take possession of petitioner's land within 90 days after the award instead of waiting until the award was paid (R. 17).

Finding of fact, number 17 (R. 19) is that the interest was paid by the City pursuant to and in discharge of its obligation under the contract (financing agreement).

B. The contract was an exercise of the borrowing power by the City.

The contract recites that the City desired to widen Woodward Avenue but that the financial condition of the City was not such as to warrant continuation of the proposed condemnation proceedings unless an extension of time for

the payment of the awards could be obtained (R. 15).

Findings of fact No. 10 and 11 (R. 14) are that the City Council's resolution that condemnation proceedings be started was on the condition that the City could obtain credit for the cost of the land from 75% of the property owners.

The findings of fact refer to the contracts as financing agreements (R. 15).

The contract recited that any balances owing on the contract would be tax exempt by the City (R. 17).

By the contracts the City obtained land in exchange for its promise to pay for the land in the future.

C. The above facts bring the case at bar on all fours with the following cases:

Commissioner v. Meyer (1939), 104 Fed. (2d) 155 (CCA 2d);

Kings County Development Co. v. Commissioner, 93 Fed. (2d) 33 (CCA 9th) certiorari denied (1938) 304 U. S. 559;

Norfolk National Bank v. Commissioner, 66 Fed. (2d) 48 (CCA 4th).

and the decision of the Circuit Court of Appeals, Sixth Circuit, in the instant case, is in direct contradiction thereof.

II. The interest paid on a condemnation award should be held to be exempted from income taxation by Section 22 (b) (4).

Under the facts of this case we think it clear that the interest in question was paid not as part of the condemnation

award, but pursuant to and in discharge of the obligation of the "financing agreements".

The Circuit Court appears to have ignored the facts in holding that the interest paid was part of the legal obligation of the condemnation award.

From that premise the Circuit Court reasoned that a condemnation award was not incurred in the exercise of the borrowing power and therefore this interest was not within the exemption of Section 22 (b) (4).

Although some of the lower courts have followed similar reasoning, the Supreme Court has never held that the exemption of interest upon "obligations of a State, Territory or any political subdivision thereof" contained in Section 22 (b) (4) should be narrowed to mean only interest upon obligations incurred in the exercise of the borrowing power. The plain meaning of the statute excludes such a construction.

We submit that the question is of broad enough importance that the Supreme Court should render its final word thereon.

III. If not exempt under Section 22 (b) (4), interest received on a condemnation award is not taxable as interest but only as capital gain, if any gain occurred.

Under the facts of this case this interest was not paid as interest on a condemnation award but as interest on a contract for the purchase of land.

The Circuit Court held this interest was not interest under Section 22 (b) (4) because part of the condemnation award, and yet was interest taxable separately from the award (irrespective of any capital gain appearing). This question whether the interest on a condemnation award is

taxable as interest or as part of capital gain, if any, is now fairly presented by the holding of the Circuit Court. This question was presented to the Circuit Court both in petitioner's brief and in the petition for rehearing.

It would seem that even condemnation award "interest" must be entitled to light somewhere. Either it is: (1) Interest on an obligation of a political subdivision and exempt under Section 22 (b) (4); or (2) It is part of the award and not taxable separately from the rest of the award, but only as part of it, if there be capital gain. It can't be fish and fowl at the same time.

The holding of the Circuit Court that interest on a condemnation award is taxable as interest is directly contrary to the decisions in the following cases:

Seaside Improvement Co. v. Commissioner
(*supra*), 105 Fed. (2d) 990 (CCA 2d);

Commissioner v. Appleby's Estate (*supra*),
123 Fed. (2d) 700 (CCA 2d);

Henry A. Kieselbach v. Commissioner, 44 BTA
279;

Edith Henry Barbour v. Commissioner, 44 BTA
1117.

We therefore respectfully submit that review by writ of certiorari should be granted.

PAUL B. MOODY
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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1132

GEORGE M. HOLLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 28c-28g) is reported in 124 F. (2d) 909.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 10, 1942 (R. 28a). A petition for rehearing was denied February 12, 1942 (R. 28h). The petition for a writ of certiorari was filed April 10, 1942. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

I

Whether interest received by petitioner from the City of Detroit on the unpaid balance of a condemnation award resulting from the taking of petitioner's property by the City in eminent domain proceedings, which award was payable in instalments pursuant to a contractual arrangement, should be excluded from gross income under section 22 (b) (4) of the Revenue Acts of 1934 and 1936 as interest on the obligation of a political subdivision of a state.

II

Whether the contention that such interest is taxable as capital gain only, raised for the first time in a petition for rehearing filed in the Circuit Court of Appeals, which dismissed the petition without opinion, is properly raised here and affords a basis for the granting of certiorari.

STATUTE AND REGULATIONS INVOLVED

The Revenue Act of 1934, c. 277, 48 Stat. 680 provides in part:

SEC. 22. GROSS INCOME.

* * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be excluded in gross income and shall be exempt from taxation under this title: * * *

(4) *Tax-Free Interest.*—Interest upon (A) the obligations of a State, Territory, or any political subdivision thereof, or the

District of Columbia; or (B) obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States; or (C) the obligations of the United States or its possessions. Every person owning any of the obligations enumerated in clause (A), (B), or (C) shall, in the return required by this title, submit a statement showing the number and amount of such obligations owned by him and the income received therefrom, in such form and with such information as the Commissioner may require. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit) and in the case of obligations of a corporation organized under Act of Congress, the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt from the taxes imposed by this title; * * *

Section 22 (b) (4) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, contains an identical provision.

Treasury Regulations 86, promulgated under the Revenue Act of 1934, provide, in part:

ART. 22 (b) (4)-1. *Interest upon State obligations.*—Interest upon the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia is exempt from the income tax. Obligations

issued by or on behalf of the State or Territory or a duly organized political subdivision acting by constituted authorities empowered to issue such obligations, are the obligations of a State or Territory or a political subdivision thereof. Special tax bills issued for special benefits to property, if such tax bills are legally collectible only from owners of the property benefited, are not the obligations of a State, Territory, or political subdivision. The term "political subdivision," within the meaning of the exemption, denotes any division of the State or Territory which is a municipal corporation, or to which has been delegated the right to exercise part of the sovereign power of the State or Territory. As thus defined, a political subdivision of a State or Territory may, for the purpose of exemption, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of a State or Territory.

Article 22 (b) (4)-1 of Regulations 94, promulgated under the Revenue Act of 1936, contains an identical provision.

STATEMENT

The City of Detroit in 1927 determined to condemn certain land, including property owned by petitioner, for a street-widening project, provided approximately 75% of the landowners to be af-

fects should sign financing agreements with the City to make possible payment in instalments of the condemnation awards (R. 14). Proceedings in eminent domain were thereupon instituted (R. 18), and after a sufficient number of property-owners had signed financing agreements the City authorized prosecution of the suit to trial (R. 14-15). Petitioner had signed one of the agreements on June 18, 1928 (R. 15). It provided that in the event of condemnation petitioner's award should be payable in ten annual instalments instead of within one year from the time when the award should be confirmed (as provided by the city charter), with interest on the unpaid balance at $4\frac{1}{4}\%$ per annum from the date of confirmation (R. 16); the City might take possession of the land condemned at any time after 90 days from confirmation, and was to receive title contemporaneously with the first payment (R. 17). Article 7 of the agreement provided that it should be construed as a contract between the parties for purchase of the land condemned at the price fixed in the court proceedings (R. 17), but that the City of Detroit could dismiss its suit altogether, in which event the contract would be without effect (R. 18).

The condemnation proceedings were completed on July 21, 1932, and the street-widening operation was begun in 1934 (R. 18). Under the agreement with petitioner the City made interest

payments to him during the tax years as follows (R. 19):

1934.....	\$1,228.15
1935.....	437.72
1936.....	726.98

The petitioner included these amounts in gross income (R. 10-11, 19), paying income tax thereon, and subsequently filed a claim for refund for each taxable year on the ground that the interest payments were exempt from taxation under section 22 (b) (4) of the Revenue Acts of 1934 and 1936 as interest on an obligation of a political subdivision of a state (R. 11-13). The refund claims were denied by the Commissioner of Internal Revenue (R. 13), and petitioner brought suit in the District Court to recover the taxes paid with respect to the receipt of interest on the condemnation award.

The District Court filed findings of fact and announced conclusions of law on May 21, 1940 (R. 10-21). It held that the controverted payments did not fall within the scope of section 22 (b) (4), and on June 13, 1940, entered judgment dismissing the complaint (R. 21). The Circuit Court of Appeals affirmed (R. 28a). A petition for rehearing filed on January 28, 1942, was denied by the Circuit Court of Appeals on February 12, 1942 (R. 28h).

ARGUMENT

1. Previous federal decisions are in accord that an award made in condemnation proceedings is not

an "obligation" of the condemning authority within the purview of section 22 (b) (4) of the Revenue Acts, and accordingly have held that interest paid on such an award is not exempt from income tax. *United States Trust Co. of New York v. Anderson*, 65 F. (2d) 575 (C. C. A. 2), certiorari denied, 290 U. S. 683; *Baltimore & Ohio R. R. v. Commissioner*, 78 F. (2d) 460 (C. C. A. 4); *Robinson v. Commissioner* 80 F. (2d) 1018 (C. C. A. 2), certiorari denied, 298 U. S. 663; *Conyngnam v. Commissioner*, 81 F. (2d) 1017 (C. C. A. 3); *Louis Schoen*, 30 B. T. A. 1075; *Mary Lincoln Isham*, 26 B. T. A. 1040; *Leo M. Klein*, 26 B. T. A. 745, appeal dismissed (C. C. A. 2, October 9, 1933); *Kansas City Southern Ry.*, 16 B. T. A. 665, affirmed, 52 F. (2d) 372 (C. C. A. 8) (without discussion of the point here involved), certiorari denied, 284 U. S. 676.

The theory of these cases, embraced by the court below (R. 28e, 28f), that the exemption contained in section 22 (b) (4) must be construed according to the legislative purpose of aiding governmental authorities in the exercise of their borrowing function, received the sanction of this Court in *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84.¹ There the interest accompanying refund of federal taxes wrongfully collected was held not exempt

¹ See also *American Viscose Corp. v. Commissioner*, 56 F. (2d) 1033 (C. C. A. 3), certiorari denied, 287 U. S. 615 (cited with approval in 293 U. S. at 87).

from income tax under a precursor of section 22 (b) (4). The opinion stated:

* * * It is clear from a consideration of the entire section and of the subject matter that the purpose of Congress, in thus excluding from gross income interest upon * * * obligations [of the United States], was to aid the borrowing power of the federal government by making its interest-bearing bonds more attractive to investors. * * * The scope of the word "obligations" as there employed must be narrowed accordingly, and not extended to include interest upon indebtedness not incurred under the borrowing power, * * * [293 U. S. 87.]

While the Court in the *Stockholms Enskilda Bank* case was considering the statute with respect to obligations of the United States, it is clear from the framing of the statute that the *rationale* of the decision is of equal application to cases involving obligations of other bodies politic.² Accordingly, petitioner's assertion (Pet. 8) that "the Supreme Court has never held that the exemption of interest upon 'obligations of a State, Territory, or any political subdivision thereof' contained in Sec-

² Cf. 293 U. S. at 87 (citing *United States Trust Co. of New York v. Anderson*, *supra*); see H. Rep. No. 767, 65th Cong., 2d Sess., p. 9 (1939-1 Cum. Bull. (Part 2), pp. 86, 92); S. Rep. No. 617, 65th Cong., 3d Sess., p. 6 (1939-1 Cum. Bull. (Part 2), pp. 117, 121); H. Rep. No. 1037, 65th Cong., 3d Sess., p. 48 (1939-1 Cum. Bull. (Part 2), pp. 130, 134).

tion 22 (b) (4) should be narrowed to mean only interest upon obligations incurred in the exercise of the borrowing power" is without force.

Petitioner urges in addition (Pet. 6-7) that the interest which it received from the City during the tax years was paid pursuant to an instalment contract the negotiation of which amounted to an exercise of borrowing power by the municipal authority, that it was therefore paid on an obligation of a political subdivision within even the restricted meaning of section 22 (b) (4), and that in this view the decision below presents a conflict with *Commissioner v. Meyer*, 104 F. (2d) 155 (C. C. A. 2); *Kings County Development Co. v. Commissioner*, 93 F. (2d) 33 (C. C. A. 9), certiorari denied, 304 U. S. 559; and *Norfolk National Bank of C. & T. v. Commissioner*, 66 F. (2d) 48 (C. C. A. 4).

Each of those cases concerned a wholly voluntary transaction under which a governmental authority made instalment payments with interest.³ Here, on the other hand, it is clear that the City acquired petitioner's land *in invitum*. The arrangement be-

³ While all three cases held that the respective contractual arrangements gave rise to an "obligation" within the statutory meaning, attention in two was focussed on questions unrelated to this case.

In the *Kings County Development Co.* case the governmental obligor had issued no tangible evidences of indebtedness, but the court held that physical securities were not essential to the existence of "obligations" within the meaning of the statute.

The essential issue in the *Norfolk National Bank* case was whether the obligation was that of a governmental authority or of a private corporation only. See 66 F. (2d) 51, 52.

tween the City and petitioner was entered into in contemplation of the usual proceedings in eminent domain and would be operative only in the event of their completion and the making of a judicial award of compensation; labelling the conditional financing agreement as a contract of sale was ineffective to change its real character in view of the right retained by the City to dismiss the condemnation suit and abandon its project of acquisition entirely. When the condemnation proceedings were completed and the award of compensation to petitioner confirmed, the obligation of the City was on the award, and interest was paid on that obligation; the financing agreement did not affect the character of the obligation, but merely specified a particular mode of discharge.

Plainly, therefore, the situation in the present case is one of interest on a condemnation award, compelling the result that the interest is includible in gross income, under the rule of the cases cited at page 7, *supra*, and accordingly no conflict with the *Meyer, Kings County*, and *Norfolk* cases is presented. Rather, the decision below is in complete agreement with decisions of the Court of Claims on identical facts in two tax refund cases. *Williams Land Co. v. United States*, 90 C. Cls. 499; *Posselius v. United States*, 90 C. Cls. 519.

2. Petitioner urges alternatively (Pet. 8-9) that if the interest paid him by the City of Detroit during the tax years was not exempt under section 22 (b) (4) it should be taxed to him only as capital

gain and not as ordinary income; he asserts that the failure of the Circuit Court of Appeals to treat the interest as capital gain conflicts with the decisions of the Second Circuit in *Seaside Improvement Co. v. Commissioner*, 105 F. (2d) 990, certiorari denied, 308 U. S. 618 (petition by taxpayer on other issues), and *Commissioner v. Appleby's Estate*, 123 F. (2d) 700.⁴ However, it cannot be said that the decision below presents any conflict with those cases since the issue on which conflict is alleged was not resolved by the court below. That issue was not raised by petitioner until his petition for rehearing in the Circuit Court of Appeals (see R. 28h *et seq.*)⁵ and there

⁴ Petitioner also cites as conflicting *Henry A. Kieselbach*, 44 B. T. A. 279, and *Edith Henry Barbour*, 44 B. T. A. 1117. The Board's decision in the *Kieselbach* case was reversed by the Circuit Court of Appeals for the Third Circuit on April 7, 1942. See 4 CCH Federal Tax Service [1942], par. 9407.

⁵ Petitioner in the petition for certiorari (Pet. 9) and in the petition for rehearing (page 1) states that the question was presented to the Circuit Court of Appeals in his brief on the merits in that court. An examination of that brief, however, shows that petitioner did not then contend that the interest received on the unpaid balance of the condemnation award was taxable only as capital gain. Instead, petitioner stated in the brief at page 1:

"The only question in this case is whether interest paid to appellant by the City of Detroit on a contract between appellant and the City of Detroit is exempted from income tax by the provisions of Section 22 (b) (4) of the Revenue Act applicable to the years in which the interest was paid."

Paragraph 4 of the petition for rehearing (page 2) argues the factual improbability, if not impossibility, that petitioner

is nothing to show that the court then passed on the question.⁶ It was, of course, discretionary with the court below whether to pass on the issue or not; its failure to do so in the circumstances was clearly not an abuse of discretion. This is true particularly since the taxpayer's claim for administrative refund was based on a specific ground of *exemption* (see R. 11-13) and no attempt was ever made to amend the claim in order to assert the different ground that the interest payments in question, if income, should be treated only as capital gain. It is at least doubtful that such an amendment could have been made in the present case after the original period of limitation for filing a refund claim had expired.⁷ Cf. *United States*

realized any capital gain. The record is devoid of evidence on this point, emphasizing the fact that the issue was raised for the first time in the appellate court.

⁶ The petition for rehearing was denied by the court below without opinion (R. 28h).

⁷ The petition for rehearing was filed on January 28, 1942 (R. 28h). Petitioner filed his most recent return for the tax years here involved on March 15, 1937 (R. 10), and his most recent payment of tax with respect to the interest now in suit was made on June 15, 1938 (R. 11). Section 322 (b) (1) of the Internal Revenue Code provides:

"Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later."

v. *Garbutt Oil Co.*, 302 U. S. 528.⁶ Without proper claim for refund filed with the Commissioner of Internal Revenue, no suit for refund may be maintained. Internal Revenue Code, sec. 3772.

CONCLUSION

The decision of the Circuit Court of Appeals with respect to exemption is correct and presents no conflict. Further, no conflict is presented on the second question since it was not passed on by the court below and has not been properly raised in the present suit. It is therefore respectfully submitted that the petition should be denied.

CHARLES FAHY,

Solicitor General.

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

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MAY 1942.

⁶ Determination of the issue whether the interest received by petitioner from the City of Detroit constituted capital gain rather than ordinary income would have necessitated an inquiry wholly different from that appropriate to determine whether the interest was exempt under section 22 (b) (4) of the Revenue Acts of 1934 and 1936.